

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 20, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TEZOC M.,¹

Plaintiff,

v.

MARTIN O'MALLEY,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 4:23-CV-05073-MKD

ORDER AFFIRMING THE
COMMISSIONER'S DECISION

ECF Nos. 9, 14

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Martin O'Malley became the Commissioner of Social Security on December 20, 2023. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Martin O'Malley is substituted for Kilolo Kijakazi as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' briefs.³ ECF Nos. 9, 14. The Court,
2 having reviewed the administrative record and the parties' briefing, is fully
3 informed. For the reasons discussed below, the Court affirms the Commissioner's
4 decision.

5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. §
7 1383(c)(3).

8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g)
11 is limited; the Commissioner's decision will be disturbed "only if it is not
12 supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698
13 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant
14 evidence that a reasonable mind might accept as adequate to support a

15 _____
16 ³ Plaintiff's opening brief is labeled a Motion for Summary Judgment. ECF No.
17 9. However, the supplemental rules for Social Security actions under 42 U.S.C. §
18 405(g) went into effect on December 1, 2022; Rule 5 and Rule 6 state the actions
19 are presented as briefs rather than motions. Fed. R. Civ. P. Supp. Soc. Sec. R. 5,
20 6.

1 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,
2 substantial evidence equates to “more than a mere scintilla[,] but less than a
3 preponderance.” *Id.* (quotation and citation omitted). In determining whether the
4 standard has been satisfied, a reviewing court must consider the entire record as a
5 whole rather than searching for supporting evidence in isolation. *Id.*

6 In reviewing a denial of benefits, a district court may not substitute its
7 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
8 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than
9 one rational interpretation, [the court] must uphold the ALJ’s findings if they are
10 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*,
11 674 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §
12 416.902(a). Further, a district court “may not reverse an ALJ’s decision on
13 account of an error that is harmless.” *Id.* An error is harmless “where it is
14 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
15 (quotation and citation omitted). The party appealing the ALJ’s decision
16 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,
17 556 U.S. 396, 409-10 (2009).

18 SEQUENTIAL EVALUATION PROCESS

19 After a child has been found to be entitled to disability benefits, the
20 Commissioner is required to redetermine whether the claimant continues to be

1 entitled to benefits once they reach the age of 18. 20 C.F.R. § 416.987. The
2 Commissioner has established a multi-step sequential evaluation process for
3 determining whether a person's disability has ended. 20 C.F.R. § 416.994(b)(5).
4 This multi-step continuing disability review process is similar to the five-step
5 sequential evaluation process used to evaluate initial claims, with additional
6 attention as to whether there has been medical improvement from the point of the
7 finding of disability (the comparison point decision) through the redetermination
8 decision. *Compare* 20 C.F.R. § 416.920 *with* § 416.994(b)(5). However, when a
9 child's eligibility for benefits is redetermined under the adult criteria when the
10 child reaches age 18, the ALJ must consider the redetermination under the rules
11 that apply to an adult's new application, 20 C.F.R. § 416.920, not the criteria set
12 forth in 20 C.F.R. § 416.994. 20 C.F.R. § 416.987(b). A claimant is disabled
13 only if his impairment is "of such severity that [s]he is not only unable to do his
14 [or her] previous work[,] but cannot, considering his [or her] age, education, and
15 work experience, engage in any other kind of substantial gainful work which
16 exists in the national economy." 42 U.S.C. § 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
20 work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in

1 “substantial gainful activity,” the Commissioner must find that the claimant is not
2 disabled. 20 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers
6 from “any impairment or combination of impairments which significantly limits
7 [his or her] physical or mental ability to do basic work activities,” the analysis
8 proceeds to step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does
9 not satisfy this severity threshold, however, the Commissioner must find that the
10 claimant is not disabled. *Id.*

11 At step three, the Commissioner compares the claimant’s impairment to
12 severe impairments recognized by the Commissioner to be so severe as to
13 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §
14 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must pause to assess
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work

activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. *Id.* If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant

1 is capable of performing other work; and (2) such work “exists in significant
2 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
3 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 On February 11, 2009, Plaintiff protectively filed for Title XVI
6 supplemental security income benefits alleging a disability onset date of February
7 1, 2004. Tr. 200, 537. Plaintiff was found disabled as of February 1, 2009. Tr.
8 88, 90. At age 18, Plaintiff’s eligibility was redetermined, and on September 18,
9 2017, he was notified he no longer qualified for benefits.⁴ Tr. 104-06. Plaintiff
10 requested a reconsideration of the cessation, and the decision was upheld on May
11 15, 2018. ECF No. 107-08, 111-19. Plaintiff appeared before an administrative
12 law judge (ALJ) on October 17, 2019. Tr. 33-87. On November 12, 2019, the
13 ALJ denied Plaintiff’s claim. Tr. 12-30. Plaintiff appealed the denial, resulting in
14 a remand from this Court. Tr. 611-18. Plaintiff appeared for a remand hearing on
15

16 ⁴ An age 18 redetermination is considered a new claim filed on the day the
17 claimant attains age 18; as such, Plaintiff’s redetermination was considered filed
18 in February 2017, and the Court applies the regulations applicable to claims filed
19 before March 27, 2017. *See* DI 24503.050 Determining the Filing Date for
20 Evaluating Evidence, SSA POMS DI 24503.050.

1 February 2, 2023. Tr. 558- 82. At the hearing, Plaintiff requested a closed period
2 of disability from November 2017 to January 19, 2020, when Plaintiff began
3 working at an SGA level. Tr. 538, 565. On March 13, 2023, the ALJ again
4 denied Plaintiff's claim. Tr. 534-57.

5 The ALJ did not address any step one findings and thus did not make a
6 determination regarding SGA. The ALJ noted Plaintiff requested a closed period
7 because of his return to work. Tr. 545. At step two, the ALJ found that Plaintiff
8 has the following severe impairments: diabetes, borderline IQ, and attention-
9 deficit hyperactivity disorder (ADHD). *Id.*

10 At step three, the ALJ found Plaintiff does not have an impairment or
11 combination of impairments that meets or medically equals the severity of a listed
12 impairment. *Id.* The ALJ then concluded that Plaintiff has the RFC to perform a
13 full range of work at all exertional levels with the following limitations:

14 [Plaintiff] is limited to simple, routine, repetitive tasks with no detail
15 work, no more than ordinary production requirements, no fast-paced,
16 assembly-type work, and no complex tasks. He can handle no more
than occasional changes in work duties. He cannot work at
unprotected heights.

17 Tr. 544.

18 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 549. At
19 step five, the ALJ found that, considering Plaintiff's age, education, work
20 experience, RFC, and testimony from the vocational expert, there were jobs that

1 existed in significant numbers in the national economy that Plaintiff could
2 perform, such as laundry worker, industrial cleaner, and change house attendant.
3 Tr. 550. Therefore, the ALJ concluded Plaintiff's disability ended on September
4 18, 2017, and he has not become disabled again since that date. *Id.*

5 Per 20 C.F.R. § 416.1484, the ALJ's decision following this Court's prior
6 remand became the Commissioner's final decision for purposes of judicial review.

7 **ISSUES**

8 Plaintiff seeks judicial review of the Commissioner's final decision denying
9 him supplemental security income benefits under Title XVI of the Social Security
10 Act. Plaintiff raises the following issues for review:

- 11 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 12 2. Whether the ALJ conducted a proper step-three analysis;
- 13 3. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 14 4. Whether the ALJ conducted a proper step-five analysis.

15 ECF No. 9 at 5-6.

16 **DISCUSSION**

17 **A. Medical Opinion Evidence**

18 Plaintiff contends the ALJ erred in her consideration of the opinions of
19 Lynn Orr, Ph.D.; Richard Borton, Ph.D.; and Steven Rubin, Ph.D. ECF No. 9 at
20 8-16.

1 There are three types of physicians: “(1) those who treat the claimant
2 (treating physicians); (2) those who examine but do not treat the claimant
3 (examining physicians); and (3) those who neither examine nor treat the claimant
4 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
5 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations
6 omitted). Generally, a treating physician’s opinion carries more weight than an
7 examining physician’s, and an examining physician’s opinion carries more weight
8 than a reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more
9 weight to opinions that are explained than to those that are not, and to the opinions
10 of specialists concerning matters relating to their specialty over that of
11 nonspecialists.” *Id.* (citations omitted).

12 If a treating or examining physician’s opinion is uncontradicted, the ALJ
13 may reject it only by offering “clear and convincing reasons that are supported by
14 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
15 “However, the ALJ need not accept the opinion of any physician, including a
16 treating physician, if that opinion is brief, conclusory and inadequately supported
17 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
18 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
19 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
20 may only reject it by providing specific and legitimate reasons that are supported

1 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
2 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may
3 serve as substantial evidence if it is supported by other independent evidence in
4 the record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

5 *I. Dr. Orr*

6 On September 5, 2017, Dr. Orr, a consultative examiner, conducted a
7 psychological evaluation and rendered an opinion on Plaintiff’s functioning. Tr.
8 424-28. Dr. Orr diagnosed Plaintiff with ADHD, predominantly inattentive
9 presentation; specific learning disorder with impairment in reading, written
10 expression, and mathematics; and borderline intellectual functioning. Tr. 427.
11 Dr. Orr opined Plaintiff has limited fund of knowledge, some difficulty in
12 concentration, impaired abstract thinking, and limited insight and judgment. Tr.
13 428. Dr. Orr further opined Plaintiff is a “good candidate” for simple, redundant
14 tasks with an absence of complexity with instructions or information repeated
15 frequently; he will have difficulty with sophisticated social communication; and
16 he will need assistance with money management. *Id.* The ALJ gave Dr. Orr’s
17 opinion some weight. Tr. 548. As Dr. Orr’s opinion was contradicted by Dr.
18 Rubin’s opinion, the ALJ was required to give specific and legitimate reasons to
19 reject Dr. Orr’s opinion. *See Bayliss*, 427 F.3d at 1216.

1 First, the ALJ found some of Dr. Orr's opinion was inconsistent with his
2 objective medical findings. *Id.* A medical opinion may be rejected if it is
3 unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r of*
4 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278
5 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th
6 Cir. 2001); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992).
7 Furthermore, incongruity between a doctor's medical opinion and treatment
8 records or notes is a specific and legitimate reason to discount a doctor's opinion.
9 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); *see also Connett v.*
10 *Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). The ALJ found Dr. Orr's opinion
11 was generally consistent with his findings, however, the opinion the Plaintiff
12 would have difficulty with sophisticated social communication was not consistent
13 the evaluation. Tr. 548. The ALJ noted Dr. Orr described Plaintiff as cooperative
14 and friendly throughout the evaluation. *Id.* (citing Tr. 425). Dr. Orr did not cite
15 to any evidence of abnormal social functioning during the evaluation and does not
16 offer an explanation as to why Plaintiff is limited in his ability to handle
17 sophisticated social communication. Tr. 425. Plaintiff reported he had dated and
18 was in a serious relationship at the time of the examination, he is part of a gamers'
19 club and previously was involved in radio broadcasting, and he spends some time
20 with family and friends. Tr. 425-26.

1 While Dr. Orr opined Plaintiff would need information repeated frequently,
2 the ALJ found this was inconsistent with the examination, which documented only
3 “slight memory problems.” Tr. 548. The ALJ noted Plaintiff was able to provide
4 details of past events and remember three out of three objects after a delay. *Id.*
5 However, Dr. Orr also stated Plaintiff’s immediate memory score indicated “some
6 significant difficulty,” as his scaled score was a five, when the average score is a
7 10. Tr. 425. His working memory score placed him in the fourth percentile. Tr.
8 427. Plaintiff also had abnormal concentration testing results; he made four errors
9 during serial 3’s and had significant difficulty spelling “world” backward. Tr.
10 426. However, it is not clear if Plaintiff’s concentration testing difficulties were
11 caused by impaired concentration, or challenges due to limited math and spelling
12 skills, as Dr. Orr noted Plaintiff had difficulty with mathematics, and has a
13 “limited vocabulary.” *Id.* The ALJ reasonably found these portions of the
14 opinion were inconsistent with the examination findings.

15 Second, the ALJ found a portion of Dr. Orr’s opinion was vague. Tr. 548.
16 A medical opinion may be rejected by the ALJ if it is conclusory or inadequately
17 supported. *Bray*, 554 F.3d at 1228. The ALJ noted that Dr. Orr did not define
18 what “sophisticated” communication refers to, and the vagueness rendered the
19 opinion less probative. Tr. 548. Dr. Orr only elaborated that Plaintiff “may have
20 difficulty understanding sophisticated social cues and is not a good candidate for

1 tasks that require sophisticated social judgment.” Tr. 427. The ALJ reasonably
2 found the opinion was vague.

3 Plaintiff contends the ALJ erred in rejecting portions of Dr. Orr’s opinion.
4 ECF No. 9 at 9. Plaintiff notes that the ALJ gave great weight to the opinion in
5 the prior decision but gave the opinion only some weight in the second decision.
6 *Id.* However, in the prior decision, the ALJ did not address the portions of the
7 opinion the ALJ now explicitly rejects. Tr. 23. The case was remanded with a
8 direction to the ALJ to reconsider the opinion evidence and the RFC, in part
9 because the ALJ did not address the limitation regarding a need for frequently
10 repeated information. Tr. 621. The ALJ has now considered the limitation and
11 offered supported reasons to reject the opinion. While Plaintiff offers an
12 alternative interpretation of the evidence, the Court may not reverse the ALJ’s
13 decision based on Plaintiff’s disagreement with the ALJ’s interpretation of the
14 record. *See Tommasetti*, 533 F.3d at 1038 (“[W]hen the evidence is susceptible to
15 more than one rational interpretation” the court will not reverse the ALJ’s
16 decision). The ALJ reasonably interpreted the medical records and Dr. Orr’s
17 opinion, and found the opinion and other evidence supported the limitations set
18 forth in the RFC.

1 2. *Dr. Borton*

2 On September 17, 2017, Dr. Borton, a State agency psychological
3 consultant, rendered an opinion on plaintiff's functioning. Tr. 94-97. Dr. Borton
4 found Plaintiff had the following severe impairments: ADHD, borderline
5 intellectual functioning, and learning disorder. Tr. 94. Dr. Borton opined Plaintiff
6 is moderately limited in understanding/remembering detailed instructions and
7 carrying out detailed instructions, sustaining an ordinary routine without special
8 supervision, maintaining attention/concentration for extended periods, completing
9 a normal workday/workweek without interruptions from psychological symptoms,
10 performing at a consistent pace without an unreasonable number and length of rest
11 periods, responding appropriately to changes in the work setting, and setting
12 realistic goals or making plans independently of others; he would be capable of
13 fairly routine and redundant simple, routine, tasks, that may require repetition of
14 instructions/information on occasion, with occasional supervision; he would have
15 more difficulty with complex repetitive tasks; he would have occasional difficulty
16 with sustained concentration/persistence, with occasional need for explanation and
17 redirection or information but capable of persisting and concentrating for at least
18 one to three step tasks, with repetition and not time sensitive tasks until well-
19 learned; he would do better with superficial social contacts and he may be slower
20 to respond in social situations; he would need some additional time to adapt to

1 non-routine changes; he may benefit from some help with planning and goal
2 setting; he would need a protective payee; and he would need some reinforcement
3 of information from time to time even for simple routine tasks. Tr. 96-97. The
4 ALJ gave Dr. Borton's opinion great weight. Tr. 549. The Commissioner may
5 only reject the opinion of a non-examining physician by reference to specific
6 evidence in the medical record. *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir.
7 1998) (citation omitted); *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

8 Plaintiff contends the ALJ erred in giving great weight to Dr. Borton's
9 opinion but not incorporating all the limitations into the RFC. ECF No. 9 at 13-
10 14; ECF No. 15 at 7-8. An ALJ need not provide reasons for rejecting a
11 physician's opinion where the ALJ incorporated them into the RFC. *Turner v.*
12 *Comm'r, Soc. Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010). Plaintiff
13 contends Dr. Borton's opinion that Plaintiff needs reinforcement, redirection,
14 reinstruction, repetition, and/or additional explanations for simple routine tasks is
15 a disabling opinion. *Id.* However, Dr. Borton opined that Plaintiff had no more
16 had moderate limitations, and stated Plaintiff retains the compacity to understand,
17 remember, and complete simple, routine tasks in a work setting, with some
18 modest reinstruction from supervisors. Tr. 94-97. Dr. Borton's opinion also
19 resulted in a finding of non-disability, indicating this is not a disabling opinion.
20 As Dr. Borton's opinion was not disabling, and the ALJ adequately interpreted the

1 opinion and accounted for it in the RFC, the ALJ did not err in her analysis of Dr.
2 Borton's opinion.

3 3. *Dr. Rubin*

4 On October 17, 2019, Dr. Rubin, a medical expert, testified regarding
5 Plaintiff's impairments and limitations. Tr. 43-47. Dr. Rubin testified there was
6 evidence of ADHD, learning disorder, and "probably" borderline intellectual
7 functioning. Tr. 43. He opined Plaintiff has moderate limitations in
8 understanding, remembering, and applying information, and mild limitations in
9 concentration, persistence, or pace, interacting with others, and adapting or
10 managing oneself. Tr. 44. Dr. Rubin further opined the evidence "could mean
11 [Plaintiff] works slower than other people in certain things," Tr. 44-45, and "in a
12 high paced situation, with very careful criteria, and trying to compete with other
13 people, I think he'll make mistakes," Tr. 47. He opined Plaintiff would have
14 difficulty with complex instructions and environmental changes that require
15 adapting and judgment and he would do better in a repetitive situation. *Id.* The
16 AJ gave Dr. Rubin's opinion some weight. Tr. 548.

17 Plaintiff contends the ALJ erred in giving Dr. Rubin's opinion great weight,
18 when Dr. Rubin's testimony contained errors. ECF No. 9 at 15-16. However, the
19 ALJ did not give the opinion great weight, but rather gave the opinion some
20 weight. Tr. 548. Further, Plaintiff offers an alternative interpretation of Dr.

1 Rubin’s testimony and the evidence, but the Court cannot remand based on an
2 alternative interpretation of the evidence when the ALJ’s interpretation is
3 reasonable. *See Tommasetti*, 533 F.3d at 1038. The ALJ reasonably interpreted
4 Dr. Rubin’s testimony and offered an explanation for the interpretation and
5 incorporation of the opinion into the RFC. Tr. 548-49. The ALJ did not err in
6 giving weight to Dr. Rubin’s opinion. Plaintiff is not entitled to remand on these
7 grounds.

8 **B. Step Three**

9 Plaintiff contends the ALJ erred at step three by failing to find Plaintiff’s
10 impairments meet or equal Listings 12.05 or 12.11. ECF No. 9 at 16-18. At step
11 three, the ALJ must determine if a claimant’s impairments meet or equal a listed
12 impairment. 20 C.F.R. § 416.920(a)(4)(iii).

13 The Listing of Impairments “describes for each of the major body systems
14 impairments [which are considered] severe enough to prevent an individual from
15 doing any gainful activity, regardless of his or her age, education or work
16 experience.” 20 C.F.R. § 416.925. “Listed impairments are purposefully set at a
17 high level of severity because ‘the listings were designed to operate as a
18 presumption of disability that makes further inquiry unnecessary.’” *Kennedy v.*
19 *Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S.
20 521, 532 (1990)). “Listed impairments set such strict standards because they

1 automatically end the five-step inquiry, before residual functional capacity is even
2 considered.” *Kennedy*, 738 F.3d at 1176. If a claimant meets the listed criteria for
3 disability, she will be found to be disabled. 20 C.F.R. § 416.920(a)(4)(iii).

4 “To *meet* a listed impairment, a claimant must establish that he or she meets
5 each characteristic of a listed impairment relevant to his or her claim.” *Tackett*,
6 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). “To *equal* a
7 listed impairment, a claimant must establish symptoms, signs and laboratory
8 findings ‘at least equal in severity and duration’ to the characteristics of a relevant
9 listed impairment” *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting
10 20 C.F.R. § 404.1526(a)). “If a claimant suffers from multiple impairments and
11 none of them individually meets or equals a listed impairment, the collective
12 symptoms, signs and laboratory findings of all of the claimant’s impairments will
13 be evaluated to determine whether they meet or equal the characteristics of any
14 relevant listed impairment.” *Id.* However, “[m]edical equivalence must be based
15 on medical findings,” and “[a] generalized assertion of functional problems is
16 not enough to establish disability at step three.” *Id.* at 1100 (quoting 20 C.F.R. §
17 404.1526(a)).

18 The claimant bears the burden of establishing his impairment (or
19 combination of impairments) meets or equals the criteria of a listed impairment.
20 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). “An adjudicator’s

1 articulation of the reason(s) why the individual is or is not disabled at a later step
2 in the sequential evaluation process will provide rationale that is sufficient for a
3 subsequent reviewer or court to determine the basis for the finding about medical
4 equivalence at step 3.” Social Security Ruling (SSR) 17-2P, 2017 WL 3928306,
5 at *4 (effective March 27, 2017).

6 Here, the ALJ found that Plaintiff’s impairments and combinations of
7 impairments did not meet or equal any listings, including Listings 12.05 and
8 12.11. Tr. 540. Listing 12.05 is satisfied by either the A or B criteria being met:

9 **A. Satisfied by 1, 2, and 3:**

- 10 1. Significantly subaverage general intellectual functioning evident in
11 your cognitive inability to function at a level required to participate
12 in standardized testing of intellectual functioning; and
13 2. Significant deficits in adaptive functioning currently manifested by
14 your dependence upon others for personal needs (for example,
15 toileting, eating, dressing, or bathing); and
16 3. The evidence about your current intellectual and adaptive
17 functioning and about the history of your disorder demonstrates or
18 supports the conclusion that the disorder began prior to your
19 attainment of age 22; or

20 **B. Satisfied by 1, 2, and 3:**

- 21 1. Significantly subaverage general intellectual functioning
22 evidenced by a or b:
23 a. A full scale (or comparable) IQ score of 70 or below on an
24 individually administered standardized test of general
25 intelligence; or
26 b. A full scale (or comparable) IQ score of 71-75 accompanied by
27 a verbal or performance IQ score (or comparable part score) of

70 or below on an individually administered standardized test of general intelligence; and

2. Significant deficits in adaptive functioning currently manifested by extreme limitation of one, or marked limitation of two, of the following areas of mental functioning:

a. Understand, remember, or apply information; or

b. Interact with others; or

c. Concentrate, persist, or maintain pace; or

d. Adapt or manage oneself; and

3. The evidence about your current intellectual and adaptive functioning and about the history of your disorder demonstrates or supports the conclusion that the disorder began prior to your attainment of age 22.

20 C.F.R. § 404, Appendix 1 to Subpt. P., App. 1 § 12.05 (Listing 12.05).

Listing 12.11 addresses neurodevelopmental disorders; learning disorders and borderline intellectual functioning are evaluated under Listing 12.11. *Id.* at §§ 12.00B9, 12.11. Listing 12.11 is satisfied by A and B:

A. Medical documentation of the requirements of paragraph 1, 2, or 3:

1. One or both of the following:

a. Frequent distractibility, difficulty sustaining attention, and difficulty organizing tasks; or

b. Hyperactive and impulsive behavior (for example, difficulty remaining seated, talking excessively, difficulty waiting, appearing restless, or behaving as if being “driven by a motor”).

2. Significant difficulties learning and using academic skills; or

3. Recurrent motor movement or vocalization; and

1 B. Extreme limitation of one, or marked limitation of two, of the
2 following areas of mental functioning:

- 3 1. Understand, remember, or apply information;
- 4 2. Interact with others;
- 5 3. Concentrate, persist, or maintain pace; or
- 6 4. Adapt or manage oneself.

7 *Id.* at § 12.11 (Listing 12.11).

8 Plaintiff has not met his burden in demonstrating he meets or equals either
9 listing. Regarding Listing 12.05, Plaintiff does not cite to any evidence to
10 support a finding he meets or equals 12.05A. Listing 12.05B requires that all
11 three subparts be satisfied. Listing 12.05. Plaintiff's IQ score is documented as
12 68 or 76, and his verbal score was 66, and there is evidence his condition began
13 prior to age 22. *See* ECF No. 9 at 15-16. However, the listing requires an
14 extreme limitation in one or marked limitation in two of the areas of mental
15 functioning. Listing 12.05A(B)(2). Plaintiff cites to evidence of one opinion
16 stating Plaintiff had only one marked limitation. ECF No. 9 at 15-16 (citing Tr.
17 470). Plaintiff has not demonstrated he meets Listing 12.05. He does not offer
18 an explanation as to how his impairments are equal in severity to Listing 12.05.

19 Plaintiff contends the ALJ failed to consider Listing 12.11. ECF No. 9 at
20 17. However, the ALJ considered Listing 12.11 and found Plaintiff did not meet

1 or equal Listing 12.11. Tr. 540. Plaintiff appears to contend he meets or equals
2 Listing 12.11 because he has significant difficulties learning and using academic
3 skills and his verbal comprehension and working memory scores were in the
4 first percentile, which corresponds to marked limitations to understanding,
5 remembering, or applying information, and concentrating, persisting, or
6 maintain pace. ECF No. 9 at 17 (citing 20 C.F.R. § 416.926a(e)(2)(iii)). The
7 cited regulation applies to functional equivalence for children and not for adult
8 claims. 20 C.F.R. § 416.926a. Further, multiple psychological consultants and
9 experts opined Plaintiff's limitations were less than marked. Tr. 44, 94, 428,
10 476. Plaintiff has not met his burden in demonstrating his impairments meet or
11 equal a listing. The ALJ did not err at step three.

12 **C. Plaintiff's Symptom Claims**

13 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
14 convincing in discrediting his symptom claims. ECF No. 9 at 18-21. An ALJ
15 engages in a two-step analysis to determine whether to discount a claimant's
16 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
17 "First, the ALJ must determine whether there is objective medical evidence of an
18 underlying impairment which could reasonably be expected to produce the pain or
19 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
20 "The claimant is not required to show that [the claimant's] impairment could

1 reasonably be expected to cause the severity of the symptom [the claimant] has
2 alleged; [the claimant] need only show that it could reasonably have caused some
3 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

4 Second, “[i]f the claimant meets the first test and there is no evidence of
5 malingering, the ALJ can only reject the claimant’s testimony about the severity
6 of the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
8 omitted). General findings are insufficient; rather, the ALJ must identify what
9 symptom claims are being discounted and what evidence undermines these
10 claims. *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas*, 278 F.3d at 958 (requiring
11 the ALJ to sufficiently explain why it discounted claimant’s symptom claims)).
12 “The clear and convincing [evidence] standard is the most demanding required in
13 Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014)
14 (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.
15 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and
17 limiting effects of a claimant’s symptoms include: 1) daily activities; 2) the
18 location, duration, frequency, and intensity of pain or other symptoms; 3) factors
19 that precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness,
20 and side effects of any medication an individual takes or has taken to alleviate

1 pain or other symptoms; 5) treatment, other than medication, an individual
2 receives or has received for relief of pain or other symptoms; 6) any measures
3 other than treatment an individual uses or has used to relieve pain or other
4 symptoms; and 7) any other factors concerning an individual's functional
5 limitations and restrictions due to pain or other symptoms. SSR 16-3p, 2016 WL
6 1119029, at *7; 20 C.F.R. § 416.929(c). The ALJ is instructed to "consider all of
7 the evidence in an individual's record," to "determine how symptoms limit ability
8 to perform work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

9 The ALJ found that Plaintiff's medically determinable impairments could
10 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
11 statements concerning the intensity, persistence, and limiting effects of his
12 symptoms were not entirely consistent with the evidence. Tr. 545.

13 *1. Lack of Treatment*

14 The ALJ found Plaintiff's allegations of disabling impairments were
15 inconsistent with his lack of treatment. Tr. 545-46. An unexplained, or
16 inadequately explained, failure to seek treatment or follow a prescribed course of
17 treatment may be considered when evaluating the claimant's subjective
18 symptoms. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). Plaintiff stopped
19 taking his medication for his diabetes and ADHD, reportedly because an
20 emergency department physician told him to discontinue the medications. Tr.

1 545. The ALJ found it was “highly improbable” an emergency physician would
2 advise abruptly stopping medications. *Id.* Plaintiff alleges he stopped his
3 medications because he was experiencing brain fog as a side effect, but the ALJ
4 noted the alleged side effect is not documented anywhere in the record. Tr. 545-
5 46. While Plaintiff alleges he was able to begin working at an SGA level after
6 stopping medication because he has seen medical improvement since stopping the
7 medications, Tr. 564-65, there is no medical documentation of such improvement.
8 At the remand hearing, Plaintiff’s counsel stated that after the emergency
9 department visit, Plaintiff stopped his medications and did not go to a primary
10 care provider to discuss the medication cessation. Tr. 564. Plaintiff reported he
11 did not go to “the doctor for two years during this closed [period].” Tr. 565.
12 Plaintiff “maintains that concentration problems contribute to his disabling
13 allegations,” but offers no reasonable explanation as to why he did not pursue any
14 treatment for the symptoms during the relevant period. ECF No. 9 at 20. The
15 ALJ reasonably found Plaintiff’s lack of treatment was inconsistent with his
16 allegations of disabling limitations. This was a clear and convincing reason to
17 reject Plaintiff’s claims.

18 *2. Inconsistent Objective Medical Evidence*

19 The ALJ found Plaintiff’s allegations were inconsistent with the objective
20 medical evidence. Tr. 545-47. An ALJ may not discredit a claimant’s symptom

1 testimony and deny benefits solely because the degree of the symptoms alleged is
2 not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d
3 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.
4 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*, 400 F.3d at 680.
5 However, the objective medical evidence is a relevant factor, along with the
6 medical source's information about the claimant's pain or other symptoms, in
7 determining the severity of a claimant's symptoms and their disabling effects.
8 *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2).

9 As discussed *supra*, Plaintiff's allegations of side effects caused by his
10 medications are not documented in the medical records. Tr. 545-46. The ALJ
11 also found Plaintiff's performance on examinations was inconsistent with
12 Plaintiff's allegations of disabling limitations. Tr. 546-47. While Plaintiff had
13 some difficulties performing serial threes and spelling "world" backward, he was
14 able to follow the conversation without difficulty, he was cooperative and
15 friendly, and he had normal grooming, speech, thought processes, orientation,
16 mood, and psychomotor activity. *Id.* Plaintiff reported he was able to interact
17 with others, complete his activities of daily activity, read for up to three hours per
18 week, play video games for five to seven hours in a day, and he reported being
19 able to manage his anxiety and complete tests in school. Tr. 546-47. While
20 Plaintiff alleges he had disabling limitations during the relevant period, there is

1 minimal objective evidence to support his allegations. The ALJ reasonably found
2 the objective medical evidence was inconsistent with Plaintiff's allegations. This
3 was a clear and convincing reason, along with the other reasons offered, to reject
4 Plaintiff's claims.

5 *3. Improvement with Treatment*

6 The ALJ found Plaintiff's impairments, when treated, were not as severe as
7 Plaintiff alleged. Tr. 546-48. The effectiveness of treatment is a relevant factor in
8 determining the severity of a claimant's symptoms. 20 C.F.R. § 416.913(c)(3);
9 *see Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006);
10 *Tommasetti*, 533 F.3d at 1040 (a favorable response to treatment can undermine a
11 claimant's complaints of debilitating pain or other severe limitations). The ALJ
12 found Plaintiff's ADHD was mostly controlled on medication, as supported by
13 examination findings. Tr. 546. Records documented Plaintiff's ADHD symptoms
14 as stable, and well-controlled on medication, and Plaintiff reported good results
15 with Adderall. Tr. 547. Plaintiff also reported improvement with his diabetes
16 medications. *Id.* The ALJ reasonably concluded that Plaintiff's impairments,
17 when treated, were not as severe as Plaintiff alleged. This finding is supported by
18 substantial evidence and was a clear and convincing reason to discount Plaintiff's
19 symptom complaints. Plaintiff is not entitled to remand on these grounds.
20

1 The District Court Executive is directed to file this Order, provide copies to
2 counsel, and **CLOSE THE FILE**.

3 DATED May 20, 2024.

4 s/Mary K. Dimke
5 MARY K. DIMKE
6 UNITED STATES DISTRICT JUDGE
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